Notes

The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary “Medical” Intervention

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Many lesbian and gay persons live in societies that subject them to severe and gruesome forms of state-sanctioned violence—torture,¹ paramilitary death squads,² involuntary “medical” electroshock treatment,³ police gang rapes,⁴

1. In October 1994, Albanian police rounded up and then severely beat three members of the Gay Albanian Society. The members were accused of belonging to an illegal organization. Police tortured them until they named other gay persons. One of the three was taken unconscious to a hospital where he was treated for multiple leg fractures. *Gay Activists Arrested and Beaten in Albania*, Reuters, Nov. 4, 1994, available in LEXIS, World Library, Reuwl File; *Gay Activists Arrested and Tortured in Albania*, ACTION ALERT (International Gay and Lesbian Human Rights Comm’n Emergency Response Network, New York, N.Y.), Nov./Dec. 1994, at 2.

2. “In Colombia, ‘death squads’ routinely target and kill gay men and transvestites as local authorities promote what they grotesquely term ‘*limpieza social*’—‘social cleansing’. The ‘death squads’ operate without fear of prosecution: the gunmen themselves are often police officers . . .” AMNESTY INT’L, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION 1 (1994).

3. “Peter Chau [false name] shudders at the thought of being deported to Hong Kong, where he says police continue to compile a ‘pink list’ of homosexuals and where the people named could be forced to submit to ‘cures’ such as electric shocks once the British colony returns to Chinese rule in 1997.” Doris S. Wong, *More Gays Seeking U.S. Asylum*, BOSTON GLOBE, Nov. 7, 1992, at 13.

4. A Canadian court, granting asylum to an Argentinean gay man, documented the police gang rape that ensued after he cast invectives against the police for not protecting gay persons:

The claimant was then set upon mercilessly. He was beaten with billy clubs and fists, stripped, sodomized, blindfolded, tied to the walls in spread eagle fashion, given electric shock and then was forced to listen to others being tortured in the same manner. Apologies for his [verbal] outburst in the police station produced none of the forgiveness he sought. This only led to another round of being raped, beaten, tortured by electricity, and left on the wall for a long period of time. While he was unconscious he was dumped on the side of a road under a bridge, naked, with his clothes next to him.

In re Inaudi, No. T-9104459, slip op. at 3–4 (Immigration & Refugee Bd., Can., Apr. 9, 1992) (on file with author).

and capital punishment.⁵ Not surprisingly, a number of these people have sought refuge in the handful of countries now offering them asylum.⁶ In June 1994, the United States officially joined this group of nations through an administrative decision designating sexual orientation as an eligible social group category under U.S. asylum law.⁷

Despite the policy change, lesbian and gay refugees bound for the United States are far from assured of gaining admission. According to U.S. immigration statutes, an asylum applicant must (1) demonstrate past persecution or a well-founded fear of future persecution (2) on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.⁸ As a result of the new administrative decision, lesbian and gay refugees can now more assuredly satisfy the second prong's requirement. However, they may still face a difficult legal battle under the first prong's required showing of persecution.⁹ Due to a void in precedential guidance and a legal grant of discretion, immigration judges and asylum officers may well consider the claimed injuries too insubstantial to constitute persecution.¹⁰ Two

5. Iran, Mauritania, and Yemen employ the death penalty for same-sex sexual practices. AMNESTY INT'L, *supra* note 2, at 33-34. In a leading case, the Federal Administrative Court of the Federal Republic of Germany granted asylum to an Iranian man who was in danger of being executed solely because of his sexual orientation. *Cases and Comments*, 1 INT'L J. REFUGEE L. 101, 110 (1989) (citing BVerwGE, No. 19880315 (1986)).

6. The list includes: Australia, Belgium, Canada, Finland, Germany, the Netherlands, and the United Kingdom. See INTERNATIONAL GAY & LESBIAN HUMAN RIGHTS COMM'N ASYLUM PROJECT, U.S. ASYLUM LAW FACT SHEET (1995).

7. By Attorney General Order No. 1895-94, dated June 19, 1994, Attorney General Janet Reno elevated to precedent the Board of Immigration Appeal (BIA) decision in *In re Toboso-Alfonso*, thereby classifying sexual orientation as a social group eligible for asylum status under U.S. immigration law. See *In re Toboso-Alfonso*, No. A-23220644, slip op. at n.1 (BIA 1990) (interim decision no. 3222). Only BIA opinions officially designated for publication obtain precedential value. These decisions represent a tiny percentage of all administrative asylum adjudications, which include BIA, immigration judge, and asylum office decisions. See LAWYERS COMM. FOR HUMAN RIGHTS, REPRESENTING ASYLUM APPLICANTS 11 (interim ed. 1994) (citing 8 C.F.R. § 3.1(g) (1994)).

8. See 8 U.S.C. § 1101(a)(42)(A) (1988). The relevant portion of the statute reads:

The term "refugee" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

Id.

9. Duke Austin, spokesperson for the INS in Washington, stated prior to the 1994 policy change, "'To say they are a social group is one thing To say they are a social group that is persecuted [in every country] is another thing.'" Wong, *supra* note 3, at 19. Daniel Kesselbrenner, a director of the National Lawyers Guild Immigration Project, attributes both this attitude and the "uphill battle" facing lesbian and gay refugees in the U.S. asylum process to general social and legislative intransigence. *Id.* He alludes to social and legal intolerance evidenced in state sodomy statutes, Supreme Court validation of these laws in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and the continued absence of sexual orientation in federal civil rights laws. Wong, *supra* note 3, at 19.

10. This relatively standardless approach was criticized by the former Immigration and Naturalization Service's General Counsel before his appointment. See T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 6-10 (1991). Notably, Aleinikoff advocates the expanded use of international human rights as a solution: "[I]nternational human rights law should provide the starting point: thus 'persecution' under U.S. asylum law might be established by

recent immigration court decisions,¹¹ for instance, held that forced "medical" treatment designed to alter sexual orientation did not rise to the level of persecution.¹²

This Note takes the position that the incorporation of international human rights standards into asylum claims gives needed shape to this currently amorphous standard by focusing on one of the greatest threats facing lesbian and gay refugees: involuntary "medical" intervention.¹³ Although current asylum law accepts the use of international human rights instruments in establishing persecution, practitioners rarely invoke them in proceedings. Drawing on the example of involuntary "medical" treatment, I hope to demonstrate how international human rights standards can be employed effectively, and thus to encourage their expanded use in this part of the adjudicatory process.

Part I of this Note traces the doctrinal history of incorporating international human rights principles into asylum determinations of persecution. It details the judicial and legislative acceptance of this method and the possibilities for future extension. Part II argues that subjecting lesbian and gay persons to involuntary "medical" intervention violates the Nuremberg Code's international human rights standards. Part III argues that human rights standards under the Helsinki Accord independently proscribe forced "medical" sexual orientation interventions. In future cases, if sexual orientation asylum applicants establish that the treatment they fear is a violation of international human rights

showing deprivation of fundamental human rights or serious harm imposed as a penalty on the exercise of a fundamental human right" *Id.* at 21-22.

11. *In re Pitcherskaia*, No. A-72143932 (Immigration Judge June 13, 1994) (on file with author); *In re Chau*, No. A-71039582 (Immigration Judge June 14, 1993) (on file with author).

12. In *Chau*, a gay man sought refuge from the Chinese government's version of forced "medical" intervention. See *In re Chau*, slip op. at 7. Chau testified that the present Hong Kong government would imprison him for life if officials learned of his sexual orientation. He further established that the Chinese government, which assumes control of Hong Kong in 1997, requires lesbian and gay persons to undergo "electroshock therapy" and reeducation camp programs in order to "cure" them of their sexual orientation. *Id.* at 6-7. Although this case was decided prior to the recent official policy change, it occurred after the BIA case which formed the basis for the Attorney General's decision. The *Chau* judge specifically noted that the issue of whether sexual orientation is a social group was not in question. *Id.* at 18. However, he concluded that China's forced psychiatric procedures, though classifiable under "discrimination of various kinds," fell short of persecution. *Id.* at 23 (citing U.S. Dep't of State Advisory Opinion).

In re Pitcherskaia concerned the case of a lesbian applicant who claimed a fear of institutionalization in Russian psychiatric hospitals and of compulsory "medical" procedures, including the administration of mind-altering drugs. See *In re Pitcherskaia*, slip op. at 12-13. The immigration judge denied her claim for asylum. He considered Russia's involuntary institutionalization and forced shock treatment of lesbian women to be "a question of degree . . . [not] reach[ing] the point of persecution." *Id.* at 24.

13. Amnesty International records this practice as one of the worst forms of abuse facing sexual orientation prisoners of conscience:

In some countries, lesbians and gay men in custody have been subjected to forced "medical" treatment to change their sexual orientation. This kind of abuse may include electric shock and other forms of "aversion therapy" or the use of psychotropic drugs.

. . . Reports of this kind of ill-treatment have been received by Amnesty International regarding practices in the former Soviet Union and in China.

AMNESTY INT'L, *supra* note 2, at 19.

standards, the second prong's persecution requirement should be considered fulfilled and asylum granted.

I. INCORPORATION OF INTERNATIONAL HUMAN RIGHTS STANDARDS INTO U.S. ASYLUM LAW

Current asylum law accepts the legitimacy of incorporating international human rights standards in resolving determinations of persecution.¹⁴ This acceptance grew, in part, out of the historical context in which the international agreements for the protection of refugees originated. With the Holocaust and other Nazi denials of fundamental freedoms vividly in mind, the United Nations (U.N.) member states designated the promotion of universal human rights as a central goal of their newly established organization.¹⁵ Accordingly, the U.N. General Assembly established the Human Rights Commission, drafted the 1948 Universal Declaration of Human Rights,¹⁶ and enacted a series of other international human rights instruments.¹⁷

During this period of heightened concern, the U.N. created an international system for the protection of refugees under the 1951 Convention Relating to the Status of Refugees.¹⁸ The Convention allowed its signatories to limit their obligations to those refugee flows resulting from "events occurring in Europe before January 1, 1951,"¹⁹ but the subsequent 1967 Protocol Relating to the Status of Refugees removed all temporal and geographic limitations.²⁰ Both the Convention and Protocol became binding U.S. law through initial ratification in 1968 and further congressional enactments in 1980.²¹

14. *Kulle v. INS*, 825 F.2d 1188, 1193 (7th Cir. 1987); *Singh v. Ilchert*, 801 F. Supp. 313, 319 n.3 (N.D. Cal. 1992) (citing *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988)); *In re Laipenieks*, 18 I. & N. Dec. 433, 457 (1983).

15. See Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 4-6 (Hurst Hannum ed., 2d ed. 1992) (describing emergence of universal human rights after World War II).

16. Universal Declaration of Human Rights, U.N. Res. 217, U.N. GAOR 3d Sess., reprinted in 1948-1949 U.N.Y.B. 535, U.N. Sales No. 1950.I.11.

17. The list includes: The Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Convention on the Political Rights of Women, done Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; The International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171; The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

18. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 152 [hereinafter Convention].

19. *Id.* art. 1, para. A, cl. 2; para. B., cl. 1(a).

20. Protocol Relating to the Status of Refugees, done Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

21. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . ."). Decisions of U.S. courts and the BIA also reveal a long avowed commitment to both the Protocol and Convention. See *In re Chen*, No. A-26219652 (BIA 1989) (interim decision no. 3104); *In re Acosta*, No. A-24159781 (BIA 1985) (interim decision no. 2986).

The Convention's framers declined to codify a definition of the "persecution" from which refugees should be offered asylum. Yet there are two strong indications that international human rights standards were intended to help fill this interpretive void. First, the Convention's preamble introduced the agreement as a measure to protect individuals from violations of the Universal Declaration of Human Rights.²² Second, the United Nations High Commissioner for Refugees (UNHCR), the organization responsible for supervising and assisting the implementation of the Convention and Protocol, prescribed international human rights standards as a suggested yardstick for determining whether a foreign state practice constitutes "persecution." The UNHCR's advice is found in its main publication, the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (*Handbook*).²³ The *Handbook* states that "recourse may usefully be had to the principles set out in various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded."²⁴

In asylum cases, U.S. courts often rely on the *Handbook* for guidance,²⁵ a practice endorsed by the U.S. Supreme Court in *INS v. Cardoza-Fonseca*.²⁶ The *Cardoza-Fonseca* Court acknowledged that "in interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the . . . [*Handbook*]."²⁷ The Court determined that, although the *Handbook*

22. The first words of the Convention's Preamble read: "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . ." Convention, *supra* note 18, pmbl.

23. *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, Office of the U.N. High Commissioner for Refugees, U.N. Doc. HCR/PRO/4 (1979) [hereinafter *Handbook*].

24. *Id.* ch. II.B(2)d § 60. The *Handbook* first recognizes that "national authorities may frequently have to take decisions by using their own national legislation as a yardstick" and then advises the use of international standards as an alternative measuring tool. *Id.* This alternative method may help resolve other questions that are unique to sexual orientation claims. Under sexual orientation claims, adjudicators and practitioners conceivably will feel the need to reconcile assessments that foreign state practices constitute persecution with the Supreme Court's constitutional validation of Georgia's sodomy statute in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Under the *Handbook's* suggestion, the use of international standards rather than state legislation as a gauge may offer the more "objective" test for resolving this question.

This Note does not pursue further discussion of *Bowers*. Substantial legal scholarship on sexual orientation and asylum law already addresses the problem of reconciling *Bowers* with general possibilities of foreign state persecution. See Suzanne Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605 (1993); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 950-53 (1992).

25. See McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981); *In re Frentescu*, 18 I. & N. Dec. 244, 246 (BIA 1982); *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 468 (BIA 1980).

26. 480 U.S. 421 (1987).

27. *Id.* at 438-39.

is not legally binding, it "provides significant guidance in construing the Protocol" and has "been widely considered useful in giving content to the obligations that the Protocol establishes."²⁸ The persuasive authority of the *Handbook* and its recommendation that international human rights standards be used to evaluate claims of persecution provide foundational support to the developing judicial and administrative practice of incorporation.²⁹

Congressional pronouncements have also evinced support for incorporating international human rights principles into this aspect of asylum law. Such approval appears, for example, in the legislative history of the Holtzman Amendment,³⁰ which removed the loophole in immigration law that had previously allowed the legal entry of past agents of Nazi persecution.³¹ The legislative history demonstrates strong support for the unfolding case law's incorporation of international norms into interpretations of "persecution":

In applying the "persecution" provisions of this bill, it is the intention of the committee that determinations be made on a case-by-case basis *in accordance with the case law that has developed under the INA sections heretofore cited, as well as international material on the subject such as the opinions of the Nuremberg tribunals.*³²

The evolving doctrine of international incorporation, now endorsed by legislative sanction, has found further judicial expression in a succession of asylum decisions. These cases rely on human rights standards set forth in the Nuremberg tribunals,³³ the Universal Declaration of Human Rights,³⁴ and congressional legislation.³⁵ INS offices have also embraced the use of international human rights principles in their determinations of persecution.³⁶

28. *Id.* at 439 n.22.

29. The practice of incorporation here refers to immigration judgments that import international human rights standards to determine whether certain events and practices constitute persecution. Reliance on international human rights instruments may occur in court decisions, asylum office determinations, or in the arguments submitted by the parties represented in a case.

30. 8 U.S.C. §1251(a)(19) (1988).

31. *See id.*

32. H.R. REP. NO. 1452, 95th Cong., 2nd Sess. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4706 (emphasis added). This same excerpt of legislative history was cited with approval in *In re Laipenieks*, 18 I. & N. Dec. 433, 457 (BIA 1983).

33. *See Kulle v. INS*, 825 F.2d 1188, 1193 (7th Cir. 1987); *In re Laipenieks*, 18 I. & N. Dec. at 433.

34. *See Singh v. Ilchert*, 801 F. Supp. 313, 319 n.3 (N.D. Cal. 1992) (relying on international law in finding that brutalities suffered at hands of Indian police constituted persecution).

35. *In re Chang*, No. A-27202715 (BIA 1989) (interim decision no. 3107). In *Chang*, the Board suggested that involuntary sterilization and coerced abortions are violations of internationally recognized human rights and thus satisfy the persecution prong. The Board held, however, that Mr. Chang failed to demonstrate such acts were targeted against him on account of his political opinion, membership in a social group, race, religion, or nationality. The Board recognized these practices as international human rights violations due to congressional legislation adding them to the scope of human rights violations the State Department is required to investigate before approval of international development funds. *Id.* slip op. at n.4 (citing Foreign Relations Authorization Act, tit. I, § 127(1), 101 Stat. 1342 (1987)); *see also In re G-*, No. A-72761974 (BIA 1993) (interim decision no. 3215).

36. One section of the INS *Basic Law Manual* provides a detailed explanation of the role and influence

Given the willingness of the legal system to incorporate international human rights principles in this area, future sexual orientation claims might be strengthened through the use of such international standards. In the recent case of *In re Pitcherskaia*, the court denied asylum to a Russian lesbian refugee facing persecution in the form of "medical" interventions—institutionalization, electroshock treatment, and mind-altering drugs.³⁷ It is a productive exercise to consider whether the initial outcome of *In re Pitcherskaia* would have been different if this Note's approach had been taken, and we will therefore revisit this question at several points in the Note.³⁸ The following two parts take up two international human rights instruments, the Nuremberg Code and the Helsinki Accord, respectively, and apply their standards to cases of involuntary "medical" intervention. My selection of these human rights instruments and this form of persecution is meant to be illustrative rather than exhaustive.³⁹

of international law. See IMMIGRATION & NATURALIZATION SERV., BASIC LAW MANUAL: ASYLUM 11–13 (1991). A subsequent section, entitled "Defining Persecution," refers to "basic human rights" and "customary international law" standards as alternative gauges of persecution. *Id.* at 20–21; see Conversation with Joseph Langlois, Director of the INS New York Asylum Office, in New Haven, Conn. (Apr. 6, 1995). Director Langlois said asylum offices are both willing and competent to consider international human rights standards. According to Langlois, the confidentiality of these proceedings enables adjudicators to avoid concerns regarding foreign affairs implications since determinations based on international human rights standards would be shielded from the applicant's foreign state. *Id.*

37. *In re Pitcherskaia*, No. A-7214393 (Immigration Judge June 13, 1994).

38. *In re Pitcherskaia* has been appealed and argued before the BIA and as of mid-September 1995 had been awaiting the Board's decision for over five months. Telephone Interview with Suzanne Goldberg, Legal Counsel, Lambda Legal Defense and Education Fund (Sept. 13, 1995).

39. The application of international standards may serve claims of persecution other than involuntary medical treatment. Notably, a recent decision by the U.N. Human Rights Committee (UNHRC) with regard to Tasmania's sodomy laws would help support many asylum cases based on state curtailment of consensual same-sex sexual practices. See U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994) (on file with author). The decision found that Tasmania's sodomy statutes were incompatible with its human rights obligations under Article 17 of the International Covenant on Civil and Political Rights, which states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." *Id.* at 11–12. This decision agrees with three major rulings by the European Court of Human Rights, each separately invalidating state criminalization of private same-sex sexual practices as abrogations of the European Convention on Human Rights, Article 8, which reads: "Everyone has the right to his private and family life, his home and his correspondence." European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, art. 8. The cases are: *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1987); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981). The virtual duplication of these norms in other multilateral treaties and covenants also bolsters asylum claims made on these grounds. Consider the parallel provisions of other international human rights instruments. The Universal Declaration of Human Rights, Article 12 states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." Universal Declaration of Human Rights, *supra* note 16, art. 12. The American Convention on Human Rights, Article II(2) requires: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence, or of unlawful attacks on his honor or reputation." The American Convention on Human Rights, *supra* note 17, art. II(2).

II. HISTORICAL UNDERPINNINGS OF THE REFUGEE CONVENTION AND THE NUREMBERG CODE

Nazi Germany's use of involuntary "medical" practices as a form of persecution is highly relevant to the present asylum claims of many lesbian and gay refugees. First, these practices, as part and parcel of "the events occurring in Europe before 1 January 1951,"⁴⁰ helped produce and hence were covered under the 1951 Refugee Convention. Second, these practices received extensive review by the Nuremberg Tribunal. As such, the discussion of these practices constituted a relatively major section of the Nuremberg Code, establishing new human rights norms for "medical" procedures perpetrated on unwilling subjects. Consequently, two separate foundations exist for considering involuntary "medical" procedures as a form of persecution under asylum law: (1) correlations between historical conditions underpinning the 1951 Refugee Convention and current forms of persecution; and (2) applicable provisions of the Nuremberg Code. Courts are perhaps better suited to address the latter as this primarily entails consideration of trial documents and legal opinions. Nevertheless, reviewing the historical setting offers a legally cognizable, if not a necessary, appreciation for the type of persecution prohibited by the international refugee treaties.

A. *Historical Correlations Between Nazi Persecution and Contemporary Events*

1. *A Description of the Correlative Approach*

In asylum cases, adjudicatory bodies may readily employ a historical correlative approach as persuasive argument. The reasoning is straightforward: If certain events in Europe gave rise to and thus were covered by the Refugee Convention, the contemporary correlatives of these events should receive the Convention's same protections.⁴¹ This analytic connection is inescapable in sexual orientation claims because the Nazi treatment of lesbian and gay persons and members of other targeted groups is inextricably linked, first, to concepts such as "genocide" and "crimes against humanity" and, second, to human rights instruments such as the Universal Declaration of Human Rights.⁴² The legacy of World War II thus shapes and guides any interpretive understanding of "persecution" under asylum law. For example, in *Dwomoh*

40. Convention, *supra* note 18, art. 1(B)(1)a.

41. Correlative reasoning may be seen as a logical outgrowth of the Protocol's removal of time and place restrictions. Because the Protocol codified these alterations but left the definition of persecution unchanged, perhaps the clearest group of eligible asylees became those individuals undergoing the same forms of persecution prohibited under the original Convention but in a different location or age.

42. See PETER R. BAEHR, *THE ROLE OF HUMAN RIGHTS IN FOREIGN POLICY* 5 (1994).

v. *Sava*, the U.S. District Court for the Southern District of New York considered the refugee protections for individuals who carried out resistance activities against the Nazi regime as an instrumental historical guide for determining the proper scope of present-day asylum guarantees.⁴³

Notably, the correlative approach steered both Canadian and German courts in their initial establishment of sexual orientation asylum eligibility; they grounded their decisions in the historical roots of the Convention and the specific Nazi practices perpetrated against sexual dissidents.⁴⁴

Although the correlative approach has assisted liberal interpretations of refugee protection, it may also operate to restrict access to asylum. For example, BIA Member Michael Heilman's concurring opinion in *In re R*- used a form of the correlative technique but deployed it in order to deny a request for asylum.⁴⁵ In this case, Heilman deemed the applicant to be free from persecution in large part because of the lack of historical correlations between the treatment of the applicant's religious group in his country and the treatment of Jews in Nazi Germany.⁴⁶ This judicial maneuver requires bending the laws of elementary logic. Although a correlation signifies the existence of persecution, the absence of such a correlation does not demonstrate its lack.⁴⁷

43. See *Dwomoh v. Sava*, 696 F. Supp. 970, 976 (S.D.N.Y. 1988).

44. See *In re Inaudi*, No. T-9104459 (Immigration & Refugee Bd., Can., Apr. 9, 1992). The Canadian court relied on Germany's leading case, which, three years earlier, had deemed sexual orientation persecution an eligible basis for asylum due, in part, to the corresponding Nazi treatment of sexual dissidents. *Id.* slip op. at 5 ("Pointing to the persecution of homosexuals in the concentration camps of the Third Reich, the [German asylum] court held that homosexuality could be considered as an attribute that could be grounds for asylum . . ."). The German Administrative Court granted asylum to a gay man at risk of execution in Iran due to his sexual orientation. *Cases and Comments*, *supra* note 5, at 110 (1989); see also Goldberg, *supra* note 24 (discussing influence of Third Reich legacy on asylum grants of sexual orientation eligibility).

45. See *In re R*-, No. A-70105328 (BIA 1992) (interim decision no. 3195) (Heilman, concurring).

46. See *id.* Heilman reasoned that treatment of Sikhs by the Indian government failed to constitute "persecution" because of Sikh relationships with the national government that did not exist between Hitler and the Jews.

47. This semantic detail carries particular significance also for the general purposes of this Note. Arguing for international human rights standards as an index for persecution is a separate enterprise from applying these standards as a dispositive litmus test. In other words, if a state action breaches international human rights standards it should, by definition, constitute persecution. It would be a misuse of this approach to argue that a lack of international human rights violations precludes the existence of persecution by definition. Guarding against this co-optation requires progressive vigilance and adherence to elementary logic.

Heilman's misappropriation of the correlative method is perhaps more a demonstration of a rhetorical ploy than a systematized methodology. Although these two modalities of reasoning share a conceptual overlap, the correlative approach advised by this Note tends more towards the latter—the application of a regulatory principle. As a juridical device, it extends beyond mere rhetorical analogies to Nazism. It recognizes the rootedness of Nazi practices in forming the understanding of international human rights, the impetus for the Convention, and the definition of persecution itself. This approach requires a fairly rigorous inquiry into Nazi practices and a close match-up for the correlative results to be triggered.

2. *Correlations for Sexual Orientation Persecution*

The correlative approach should aid the articulation and evaluation of sexual orientation asylum claims under the required showing of persecution.⁴⁸ In practice, applicants may claim that certain exercises of state power constitute persecution by matching the present-day foreign state action with the corresponding actions undertaken by the Nazi regime. For example, in 1935, the Third Reich expanded the penal code's Paragraph 175, which had originally criminalized anal intercourse between males, to include all forms of male same-sex contact.⁴⁹ "[T]he courts subsequently broadened the application to a point where even a kiss or purely visual contact became punishable."⁵⁰ This history correlates, for example, with recent events in Nicaragua, where the judiciary has validated the expanded definition of same-sex criminal activity to include speech acts.⁵¹ Nicaragua's new criminal code now provides for a three-year prison term for anyone who "induces, promotes, propagandises or practices in scandalous form concubinage between two people of the same sex."⁵²

Similarly, it is startling to compare the following two accounts, the first, of events that occurred under the Third Reich, the second, of practices in contemporary China:

It was only during the Olympic Games of 1936 in Berlin that Hitler stage-managed a brief, deceptive lull for the benefit of international observers. Still, at the same time the persecution of homosexuals was stepped up in massive bar raids, in order to present visiting athletes and journalists with a "morally clean" Germany. These raids greatly increased the number of homosexual concentration camp inmates.⁵³

* * *

Gays also suffer police harassment and arrest when the authorities decide to clear the streets ahead of an important visit by foreign dignitaries.

....

48. Since standing precedent recognizes sexual orientation as an eligible social group, in part based on the relation between lesbian and gay persons and the Nazi regime, it stands to reason that the form of treatment lesbian and gay persons experienced under the Nazi regime should produce similar legal results.

49. Erwin J. Haeberle, *Swastika, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY & LESBIAN PAST* 365, 370 (Martin Bauml Duberman et al. eds., 1989).

50. *Id.*

51. See Peter Tatchell, *Theological Succour for Bigots Everywhere*, *THE INDEPENDENT* (London), May 31, 1994, at 15.

52. *Id.* (describing Nicaragua's criminal code).

53. Haeberle, *supra* note 49, at 370.

Last August, in the run-up to the East Asia Disabled Games, Peking Police arrested 200 homosexuals. Activists say some were released after paying a fine and promising to stay off the streets until the games ended. Others remained in custody for weeks.⁵⁴

The evident similarity of these events reveals a shared link to the definition of persecution.

3. *Correlations Specific to Forced "Medical" Interventions*

The recognition of involuntary "medical" intervention as persecution also correlates with the World War II background to the Convention. Involuntary "medical" intervention constituted a method of persecution for many of the specific groups targeted and hunted by Hitler's forces.⁵⁵ Lesbian and gay persons were not exempt from these general "medical" programs.⁵⁶ Rather, they faced the added risk of suffering involuntary "medical" procedures designed to alter their sexuality:

In the fall of 1944 . . . Dr. Vaernet . . . appeared in the Buchenwald concentration camp. With permission by *Himmler* . . . Vaernet started a series of experiments aimed at the *elimination of homosexuality*. The implantation of synthetic hormones into the right lower abdomen was meant to lead to a sex drive reversal. Of the total of 15 test subjects (including two previously castrated males) . . . two died, undoubtedly as a result of the operation. . . . The others died a few weeks later as a result of general weakness.⁵⁷

The connection between these past events and the present is striking. According to one recent historical study, "The verbal denigration of homosexuals, their stigmatization, imprisonment, and finally, forced 'cures' for their alleged medical condition—in all these respects the Nazis merely

54. *China's Iron Grip on 'Evil' Gays*, THE OBSERVER (London), Nov. 27, 1994, at 23.

55. "Medical" projects included: a "skeleton collection" of Jewish persons killed for their bones, 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 738–59 (1949) [hereinafter TRIALS OF WAR CRIMINALS]; tuberculosis quarantines of Polish nationals, 1 *id.* at 759–94; involuntary euthanasia of retarded children, 1 *id.* at 796–97; and mass sterilization of "gypsy" communities, 1 *id.* at 718–19.

56. On the contrary, one report indicates that the number of "homosexuals" used in these "medical" undertakings was "disproportionately large." See RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS 175 (1986).

57. EUGEN KOGON, DER SS-STAAAT 264 (1946), translated in Haeberle, *supra* note 49, at 377–78. Dr. Vaernet's sexual orientation experiments were fully within the purview of the Convention's framers, as they constituted primary material for a critical case before the International Military Tribunal. See 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 251–52. Justice Jackson's "prosecution contend[ed] that the evidence show[ed] Poppendick's criminal responsibility in connection with a series of experiments conducted at Buchenwald by Dr. Varnet [sic] . . . who claimed to have discovered a method of curing homosexuality by transplantation of an artificial gland." 2 *id.* at 251. Thus Vaernet's actions in the fall of 1944 were contained within the Convention's expansive concern for those events "occurring in Europe before 1 January 1951."

continued and intensified what had long been general practice and what, in various forms, still continues in many societies, including our own.”⁵⁸ A close comparative fit, not a loose similarity, characterizes the relationship between these Nazi practices and contemporary forms of involuntary medical treatment. The Nazis adopted the very policies from which present-day refugees are trying to escape: invasive “medical” procedures designed to permanently alter sexual orientation. Compare the 1944 concentration camp “experiments” with China’s policy of “confin[ing] homosexuals for indefinite periods of time in ‘reeducation’ camps, as well as [seeking] to ‘cure’ them with electroshock and herbs that induce vomiting to discourage erotic thoughts.”⁵⁹

If a reaction to Nazi practices helped produce the Refugee Convention’s conception of “persecution,” then the Chinese government’s reproduction of these practices should trigger the Convention’s safeguards. It is nearly axiomatic that the Nazi atrocities indelibly shaped the meaning of “persecution.” The Nazi policies were also the nominal antecedent of the Convention’s reference to protection from “events occurring in Europe before January 1, 1951.”⁶⁰ If these events are replicated in a different place and time, the persecuted individuals require a corresponding replication of asylum protection. To conclude otherwise would be to turn the Convention as extended through the 1967 Protocol into a dead letter.

A return to *In re Pitcherskaia*⁶¹ illustrates this argument. The 1967 Protocol states that “equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline.”⁶² Pitcherskaia faced involuntary confinement and the use of pharmaceuticals to deaden her same-sex sexuality.⁶³ In Nazi Germany, subjects of Dr. Vaernet’s project also faced the neutralization of their same-sex sexuality through invasive “medical” procedures. The relevant distinctions between the experience of Pitcherskaia and her German counterparts lie only in geography and time. Thus, the immigration judge’s denial of asylum to Pitcherskaia in essence discriminated against her claim for the very reasons that are proscribed by the 1967 Protocol. The following discussion of the Nuremberg Code supports this contention through an examination of an alternative legal framework.

B. *Nuremberg Code Provisions: Involuntary “Medical” Treatment*

At the conclusion of World War II, the United Nations War Crimes Commission organized the Nuremberg Tribunal of Major War Criminals in its

58. Haeberle, *supra* note 49, at 378.

59. Wong, *supra* note 3, at 19.

60. Convention, *supra* note 18, art. 1(B)(1)a.

61. *In re Pitcherskaia*, No. A-72143932 (Immigration Judge June 13, 1994).

62. Protocol, *supra* note 20, pmb1.

63. *In re Pitcherskaia*, slip op. at 12–13.

efforts to investigate, record, and adjudicate Nazi human rights violations. The Charter and the Judgment of the International Military Tribunal (IMT), collectively entitled the Nuremberg Code (the Code), now carry the weight of international law.⁶⁴ It is the argument of this Note that within these pages of legal text are the human rights principles that should govern involuntary "medical" interventions on lesbian and gay persons.

1. *The Unique Weight of Nuremberg in Asylum Law*

The Nuremberg Code carries special consequence for asylum law's first prong because of its historic association with the linguistic development of persecution.⁶⁵ The IMT helped define the contours of "persecution" in determining the guilt of persons charged with "persecutions on political, racial or religious grounds."⁶⁶ This wording closely mirrors the Convention's definition of "refugee" as a person with a "well-founded fear of being persecuted for reasons of race, religion, nationality, [or] membership in a particular social group or political opinion."⁶⁷ In this respect, the Nuremberg Code possesses an immediate connection to the literal persecution covered under the Convention. The Tribunal's coverage of these atrocities also inspired the U.N. to codify them as fundamental human rights violations through international treaties.⁶⁸ Accordingly, the Nuremberg Code represents a critical reference point for understanding postwar human rights standards and for interpreting the meaning of "persecution."

Two additional considerations enable the Nuremberg Code to function as a potentially decisive factor in asylum cases. First, as international law, the Code arguably provides binding, rather than merely guiding, legal principles

64. On December 11, 1946, the U.N. General Assembly unanimously approved both the Charter and the Judgment of the Nuremberg Tribunal as binding international law. See *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, 1946-1947* U.N.Y.B. 254, U.N. Sales No. 1947.I.18; see also *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) ("Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.").

65. Certain asylum cases have acknowledged the Nuremberg Code's guidance in determining the meaning of persecution. In *Kulle v. INS*, the Seventh Circuit upheld the claimant's deportation, in part because of his participation as an agent of Nazi persecution. See *Kulle v. INS*, 825 F.2d 1188, 1193 (7th Cir. 1987). Kulle contended that the international standards established at Nuremberg held that mere presence during acts of persecution did not constitute participation or assistance. *Id.* at 1192. Although the Seventh Circuit rejected Kulle's formalistic application of the Nuremberg principles to the issue of "participation," the court acknowledged the Code's legitimate incorporation into judicial determinations of "persecution." The court stated: "The legal principles established at Nuremberg have contributed much to certain spheres of law and to the definition of 'persecution.'" *Id.* at 1193; see also *In re Laipenieks*, 18 I. & N. Dec. 433, 457 (1983) (relying on Nuremberg opinions).

66. 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 173.

67. Convention, *supra* note 18, ch. I, art. I(A)2.

68. WILLIAM R. BOSCH, JUDGMENT ON NUREMBERG 231-32 (1970) (describing U.N. procedures for drafting codes and conventions in alignment with principles set forth by Nuremberg Tribunal).

for asylum cases.⁶⁹ A U.S. district court recently endorsed a far-reaching scope for the Code: "The Nuremberg Code is part of the law of humanity. It may be applied in both civil and criminal cases by the federal courts in the United States."⁷⁰ Second, the U.S. military secured authority for conducting the Nuremberg trials, conferring a particular burden of adherence on U.S. courts.⁷¹ The Code thus provides strong weight for anchoring an asylum claim. The following subsection employs the Code's treatment of "medical" forms of persecution to support sexual orientation applications.

2. *The Nuremberg Code's Prohibition of Involuntary "Medical" Interventions*

Opening on December 9, 1946, the very first trials held by the IMT at Nuremberg concerned the "medical" practices of the Nazi regime. The Tribunal's final opinion classified the commission of experimental "medical" practices on unwilling subjects both as war crimes and as crimes against humanity.⁷² The latter category is of greater importance for our purposes, because it grounds the unacceptability of involuntary medical techniques in non-war contexts. The count of "crime against humanity" carries additional relevance since the IMT included within its definition, "persecutions on political, racial or religious grounds."⁷³ Accordingly, the IMT's final

69. The Nuremberg Code's status as international law requires mention. But, for the purposes here, it would be sufficient if the Code merely carried the persuasive value assigned to internationally recognized human rights standards. This Note does not argue for the strong position of incorporating binding international law and the concomitant creation of judicially enforceable rights. Rather, the consideration of internationally recognized human rights norms merely functions as a persuasive guidepost for adjudicatory determinations of persecution. This Note correspondingly diverges from scholarship that argues for international law's binding effects in domestic courts. See, e.g., Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 367 (1985). Nonetheless, Nuremberg's status as international law signifies the centrality of its place in internationally recognized human rights standards.

70. *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 821 (S.D. Ohio 1995).

71. Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 883 (1990) ("It is especially incumbent upon the United States, given its leading role in establishing and participating in the Tribunal at Nuremberg, to incorporate this aspect of international law into its domestic law."). This added burden of adherence has previously influenced judicial decisionmaking in the asylum context. See, e.g., *In re Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984) ("Moreover, it would not be consistent with the policy of this nation as reflected by its participation in [the Nuremberg] trials, for an American court to shield from extradition a person charged with such crimes."). In the trials of the Nazi doctors, the United States commitment was even greater. See George J. Annas, *The Nuremberg Code in U.S. Courts: Ethics versus Expediency*, in *THE NAZI DOCTORS AND THE NUREMBERG CODE* 201, 201 (George J. Annas & Michael A. Grodin eds., 1992) ("[T]he Doctors' Trial was conducted by U.S. judges under the authority of the U.S. military, U.S. procedures were followed, and U.S. lawyers acted as the prosecutors. Thus, if any country should feel itself bound by the legal precepts of the Nuremberg Code, it is the United States."). Similarly, a recent federal court decision recognized a unique responsibility to uphold Nuremberg's principles, due to the role played by the United States in the medical trials. See *In re Cincinnati Radiation Litig.*, 874 F. Supp. at 819-20.

72. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 333-34 (1948).

73. See 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 173.

Judgment announced as the first principle of the Nuremberg Code that the voluntary consent of patients in experimental procedures is a fundamental, legally cognizable human right.⁷⁴

This aspect of the Nuremberg Code found unique recognition in a recent Supreme Court case. In *United States v. Stanley*,⁷⁵ a narrow Court majority failed to recognize a cause of action based on the government's Vietnam-era practice of LSD experimentation on unsuspecting army personnel. In a highly critical dissent, Justice Brennan outlined with approval the values of Nuremberg's first principle:

The medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable. The United States Military Tribunal established the Nuremberg Code as a standard against which to judge German scientists who experimented with human subjects. Its first principle was:

"1. *The voluntary consent of the human subject is absolutely essential.*
....."

The United States military developed the Code, which applies to all citizens—soldiers as well as civilians.⁷⁶

An appreciation for these same principles also elicited the concerns of Justice O'Connor, who separately reiterated Nuremberg's application in this case.⁷⁷

The *Stanley* dissents' evaluation of Nuremberg should govern cases involving civilian subjects, especially in circumstances apart from military interests. The situation of civilian subjects can be distinguished from the majority's holding on a number of grounds. The *Stanley* Court's judgment rested, in the first part of the decision, on a procedural error made during the first stages of the case in the Eleventh Circuit.⁷⁸ In the second part of its judgment, the Court restricted its holding to military operations and injuries resulting from activity "incident to service."⁷⁹ The majority also took special care to distinguish the case's question of damage claims from alternative

74. 2 *id.* at 181–82.

75. 483 U.S. 669, 678 (1987).

76. *Id.* at 687 (Brennan, J., concurring in part and dissenting in part) (citation omitted) (emphasis in original).

77. Justice O'Connor reasoned: "[T]he standards that the Nuremberg Military Tribunals developed to judge the behavior of the defendants stated that the 'voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts.'" 483 U.S. at 710 (O'Connor, J., concurring in part and dissenting in part) (quoting *United States v. Brandt* (The Medical Case), 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 181 (1949)) (alteration in original).

78. The Eleventh Circuit erred by encouraging Stanley to re-enter a suit pursuant to the Federal Tort Claims Act, a claim that had already been dismissed in lower court proceedings and was not the subject of the interlocutory appeal before the court. *Id.* at 677–78.

79. *Id.* at 683–84.

possibilities for constitutional redress.⁸⁰ *Stanley*'s holding thus confines itself to a narrow range of issues. The majority's failure to apply the Nuremberg Code should not seriously impinge on the distinctive legal claims open to lesbian and gay asylum applicants.

These distinctions recently found expression in the widely publicized case of *In re Cincinnati Radiation Litigation*.⁸¹ Here, the district court directly applied the *Stanley* dissents' appreciation of the Nuremberg Code based on the constitutional differentiation between civilian and military populations.⁸² The district court held that the Code, as interpreted by Justice O'Connor's dissent in *Stanley*, should apply to the U.S. government's human radiation experiments, which deliberately exposed unsuspecting civilians to massive doses of radiation.⁸³ After ten pages of discussion of Nuremberg's first principle of informed consent, the court quoted Justice O'Connor's *Stanley* dissent: "'If this principle is violated, the very least society can do is to see that the victims are compensated, as best they can be, by the perpetrators. I am prepared to say that our Constitution's promise of due process of law guarantees this much.'"⁸⁴ Interestingly, the case drew some of its prominence from testimony in congressional inquiries establishing that these actions had occurred shortly after the promulgation, and in direct violation, of the Nuremberg Code.⁸⁵

3. *Current Application of the Nuremberg Code to Involuntary Sexual Orientation Interventions*

The Nuremberg Code's first principle of informed consent has influenced the outcome of several other judicial opinions.⁸⁶ The holding of *Kaimowitz*

80. *Id.* at 684.

81. 874 F. Supp. 796 (S.D. Ohio 1995); see Ben L. Kaufman, *Lawyers Compare Experiments in Radiation to Nazi War Crimes*, CINCINNATI ENQUIRER, Oct. 14, 1994, at B2; *What a Year: Our Own List of Top 10 Stories that Made Biggest News of 1994*, CINCINNATI ENQUIRER, Jan. 1, 1995, at E2; *ABC World News Tonight: Compensation Sought for Victims of Radiation Testing* (ABC television broadcast, Apr. 11, 1994).

82. See 874 F. Supp. at 821-22.

83. "Justice O'Connor relied on the Nuremberg Code for the proposition that due process guarantees the subjects of human experiments the right to voluntary and informed consent. Because Plaintiffs in this case are not military personnel, the Court is convinced that Justice O'Connor's dissent in *Stanley* controls." *Id.* at 821 n.23 (citing *Whitlock v. Duke Univ.*, 637 F. Supp. 1463, 1470 (M.D.N.C. 1986) and *Kaimowitz v. Michigan Dep't of Mental Health*, No. 73-19434-AW (Mich. Cir. Ct. Wayne County, July 10, 1973) (unpublished case), reprinted in ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902, 913 (1974) [hereinafter *Kaimowitz*]).

84. 874 F. Supp. at 822 (quoting *U.S. v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part)).

85. See generally *Human Experimentation: An Overview on Cold War Era Programs: Hearing Before House Government Operations Subcomm. on Legislation and National Security*, 104th Cong., 2d Sess. (1994) (statement of Frank C. Conahan, Assistant Comptroller General, National Security and International Affairs Division, General Accounting Office), available in LEXIS, Legis Library, Allnws File. Conahan documents the U.S. government's violation of the Nuremberg principles, as well as of the Helsinki Accord.

86. Other courts, in assessing challenged medical procedures, have employed the Code as guidance.

v. *Department of Mental Health*,⁸⁷ probably the most influential of these cases, is also the most germane to contemporary sexual orientation asylum issues.⁸⁸ The *Kaimowitz* three-judge panel relied heavily on the Code in assessing the involuntary psychiatric treatment of persons deemed mentally deviant due to their sexual practices. Specifically, the court invalidated the Iona State hospital's use of psychosurgery without patients' informed consent, resting its decision in significant part on the principles of Nuremberg.⁸⁹ The hospital had planned to conduct surgical lobotomies pursuant to an experimental study on "sexual psychopaths."⁹⁰ In its review, the court noted that the circumstance of institutionalization demands an elevated level of judicial scrutiny, since it is a setting that necessarily exerts a "*special force* in undermining the capacity of the mental patient to make a competent decision on this issue, even though he be intellectually competent to do so."⁹¹ This statement, coupled with the *Kaimowitz* court's further recognition that "[i]nvoluntarily confined mental patients live in an inherently coercive institutional environment,"⁹² directly corresponds to the Code's stipulation

See, e.g., *Whitlock v. Duke Univ.*, 637 F. Supp. 1463, 1470 (M.D.N.C. 1986) ("[T]he Court is not left without persuasive guidance on an appropriate standard of care in such context. The United States Military Tribunal at Nuremberg adopted the Nuremberg Code as a proper statement of the law of informed consent in connection with the trials of German Scientists for human experimentation after World War II."); *Kaimowitz*, *supra* note 83, at 913-914; *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 516 (N.J. 1980) (Pashman, J., dissenting) (citation omitted).

87. *Kaimowitz*, *supra* note 83.

88. *Kaimowitz* spawned much discussion and helped shape the jurisprudence of informed consent in psychiatric treatment. For example, shortly thereafter an article from a legal symposium on psychosurgery noted: "*Kaimowitz* is probably the most important opinion yet published regarding the law's attempt to cope with man's recently augmented power to control behavior." John R. Mason, *Kaimowitz v. Department of Mental Health: A Right to be Free from Experimental Psychosurgery?*, 54 B.U. L. REV. 301, 303 (1974). *Kaimowitz*'s continuing relevance is demonstrated by the *Cincinnati Radiation Litigation* court's use of it to distinguish *Stanley*. See *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 821 n.23 (S.D. Ohio 1995). *Kaimowitz*'s legacy also includes Supreme Court recognition. Justice Brennan, in *Parham v. J.R.*, refers to *Kaimowitz* as historical evidence of the horrific medical procedures one might suffer once committed to a mental institution: "Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers. They are subject to intrusive treatment which, especially if unwarranted, may violate their right to bodily integrity." 442 U.S. 584, 626 n.4 (1979) (Brennan, J., concurring in part and dissenting in part) (citing *Kaimowitz*, *supra* note 83). Although Justice Brennan did not refer to the *Kaimowitz* court's treatment of the Nuremberg Code, his opinion's use of *Kaimowitz* suggests its continuing vitality and influence.

89. See *Kaimowitz*, *supra* note 83, at 912. Here, the court reasoned that "[t]o be legally adequate, a subject's informed consent must be competent, knowing and voluntary. In considering consent for experimentation, the ten principles known as the Nuremberg code give guidance." *Id.* The court further reasoned, "In the Nuremberg Judgment, the elements of what must guide us in decision are found." *Id.* at 913.

90. Notably, at the time of the Michigan hospital's planned study, "homosexuality" was categorized as a "sexual deviation" mental illness by the American Psychiatric Association. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 44 (2d ed. 1968). Concurrently through the 1970s, the INS routinely denied admission to lesbian and gay immigrants under statutory provisions excluding persons with a "sexual deviation" (which replaced their pre-1965 exclusion under "psychopathic personality" provisions). Robert Poznanski, *The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service's Authority Over Medical Exclusions*, 17 U. MICH. J.L. REF. 331, 331 (1984).

91. *Kaimowitz*, *supra* note 83, at 913 (emphasis added).

92. *Id.* at 915.

that voluntary consent requires that "the person involved should have legal capacity to give consent [and] should be so situated so as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion" ⁹³

A profound condition of constraint exists for many lesbian and gay persons in institutional settings. Section III.B provides a more complete description of certain of these facilities,⁹⁴ but, for now, it should suffice to recognize that institutionalization in a psychiatric hospital, alone, greatly elevates a claim under Nuremberg's first principle of informed consent. In this setting, the capacity to refuse is drastically curtailed by the alignment of overpowering institutional forces outside the inmate's control.

In response to this analysis, one argument *against* the use of the Code in these sexual orientation persecution claims could spotlight the element of experimentation. Under this objection, one might claim that a wide disjuncture exists between the Nuremberg Code's specific concern with experimentation studies and our concern with the use of psychiatric treatment as a curative. A series of responses may be enlisted to counter this objection: (1) the "medical" practices in question are invariably "experimental"; (2) even if the purpose of these practices is not experimental, the techniques may be; (3) it is neither ethically acceptable nor analytically valid to draw a distinction between experimentation and cure in this context; (4) whether the practices constitute experimentation is irrelevant because the final Nuremberg Judgment covers medical issues beyond experimentation; (5) subsequent jurisprudence expands the final Judgment beyond experimentation. The following discussion addresses each of these points separately.

First, perhaps the best argument for designating these procedures as experimentation is that the final Judgment itself so designates similar practices. The pertinent case is that of SS Colonel Helmut Poppendick and his alleged approval of Dr. Vaernet's "experiments." In this case, the IMT defined the category of experimentation to encompass the actions "by Dr. Varnet [sic] . . . who claimed to have discovered a method of curing homosexuality by transplantation of an artificial gland."⁹⁵ No subsequent developments should militate against this definition of experimentation. In fact, this option has been ruled out by leading organizations in the psychiatric community. The American Psychiatric Association (APA), in its 1993 *Position Statement on*

93. 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 181.

94. See *infra* text accompanying notes 160–61.

95. 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 251.

Homosexuality, called for the cessation of all “medical” interventions rooted in, or contributing to, the stigma of same-sex sexual orientation:

Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, the American Psychiatric Association (APA) calls on all international health organizations, psychiatric organizations, and individual psychiatrists in other countries . . . to do all that is possible to decrease the stigma related to homosexuality wherever and whenever it may occur.⁹⁶

For the foreseeable future, the world community’s established medical authorities will not support the forced “medical” techniques conducted, for example, by Singaporean,⁹⁷ Russian,⁹⁸ and Chinese⁹⁹ authorities. These countries have at times openly defied the minimal guidelines of the APA and of the international medical community in general. Recently, Singapore’s government-controlled press unapologetically announced its latest “medical treatment” for lesbian and gay citizens. According to the government’s own reports, this procedure tries “to change the patient by applying small electric shocks while showing him or her pictures of homosexuals.”¹⁰⁰ At best, these modern-day replications of Dr. Vaernet’s project are, as the IMT reasoned, experimentation.¹⁰¹

Although the IMT failed to convict Poppendick on the charges relating to Dr. Vaernet’s study, Dr. Vaernet’s surgeries are still covered by the Code. To conclude otherwise requires ignoring the Tribunal’s initial determination to review these practices under the auspices of international law. The fact that a particular murder charge fails to result in a conviction does not signify that murder is not a criminal offense. Likewise, Poppendick’s acquittal on this particular criminal count does not signify that the original crime fails to constitute a crime against humanity. Poppendick’s case instead demonstrates

96. American Psychiatric Ass’n, Position Statement on Homosexuality, 150 AM. J. PSYCHIATRY 686, 686 (1993).

97. See John Chua, *A Political Reason for Singapore Torture*, S.F. EXAMINER, May 2, 1994, at A17.

98. For official Kremlin statements that reveal purposeful intransigence in the face of criticism from the world psychiatric community, see Judicial Psychiatry on the Eve of Changes, OFFICIAL KREMLIN INT’L NEWS BROADCAST, July 6, 1992, available in LEXIS, World Library, Sovnws File.

99. Chinese medical professionals have responded to visiting foreign lecturers with flat denials that any gay persons exist in China. Vern L. Bullough and Fang Fu Ruan, Same-Sex Love in Contemporary China, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 46, 47–48 (Aart Hendriks et al. eds., 1993). Doctors in China celebrate the use of painful electroshock and vile regurgitants to purge the same-sex thoughts of their mental inmates. *Id.* at 48.

100. Chua, *supra* note 97, at A17.

101. Even assuming that foreign state officials view their actions to be medically promising for the lesbian and gay subjects of their work, the standards of Nuremberg would still apply. The Nuremberg Code’s mandate of informed consent governs both therapeutic research (intended to directly benefit or provide “effective medical therapy” for the research subjects) and nontherapeutic research (“concerned with the discovery of data through the research on the human subject”). *Whitlock v. Duke Univ.*, 637 F. Supp. 1463, 1467 (M.D.N.C. 1986).

the Code's admission of forced "medical" manipulation of sexual orientation to the realm of experimentation under international law. In this regard, such "medical" manipulation, the discussion of which forms an integral section of the IMT's final Judgment, became a founding element of its first principle of voluntary consent.

Furthermore, distinctions between asylum law and criminal law allow sexual orientation applicants to rely on this aspect of the Code without facing the burdens unique to Poppendick's prosecution. Principally, asylum applicants are saddled with significantly less onerous burdens of proof. Poppendick's hearing required the prosecution to establish guilt "beyond a reasonable doubt."¹⁰² Asylum cases, however, set one of the lowest burdens of proof legally available: demonstration of a "reasonable possibility."¹⁰³ Although the Tribunal found that there was inadequate evidence to establish Poppendick's guilt, present-day asylum cases may more easily fill this evidentiary void.¹⁰⁴ Moreover, asylum proceedings are concerned with the applicant's "well-founded fear of persecution," not the conviction of the persecutors. This legal objective is made vividly apparent by the absence of named persecutors in all parts of the proceeding. In this light, the IMT's acquittal of Poppendick is perhaps understandable, but a hypothetical denial of asylum to one of Dr. Vaernet's gay subjects would be unthinkable.

In sum, the IMT considered forced "medical" interventions on gay male prisoners both a matter for international law and a part of the body of material informing its final Judgment. This alone signifies the imbeddedness of such concerns within the edicts of the Nuremberg Code. Today, a potential victim of such "medical" intervention should be able to employ the human rights standards of Nuremberg as an index for demonstrating that asylum standards of persecution have been met.

Second, even if the practice of sexual orientation intervention were not experimentation, a foreign state's use of certain medical technology may already constitute experimentation in U.S. courts. The experimental nature of

102. 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 252.

103. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (holding that Protocol's "well-founded fear of persecution" standard for asylum claims requires only demonstration of "reasonable possibility" of persecution, which applicants might meet, for example, by demonstrating 10% possibility that they would be subject to persecution abroad).

104. These evidentiary voids were peculiar to the prosecutor's presentation of Poppendick's case. For example, the final Judgment reproduced the exhibit of a written communication between Poppendick and a Dr. Ding concerning Dr. Vaernet's experiments. 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 252. This document failed, in the Tribunal's view, to prove beyond a reasonable doubt that Poppendick was criminally involved in the hormonal experiments. 2 *id.* The Tribunal also criticized the lack of evidence demonstrating the hormonal program's effects. 2 *id.* at 252. Evidence of the latter, however, has since been uncovered. Eugen Kogon's study verified the completion and results of the surgery:

In Buchenwald a total of fifteen inmates were treated, of whom two died. Vaernet also tried his hand with men who had been castrated. The matter became the butt of many jokes on the part of the SS Medical Officers as well as the prisoners. No positive results were obtained.

EUGEN KOGON, *THE THEORY AND PRACTICE OF HELL* 160 (Heinz Norden trans., 1949) (1946).

the procedure itself may bridge the alleged gap between Nuremberg's experimentation-specific laws and the sexual orientation "cures." Thus, adjudicators and practitioners should consider the specific technique rather than just the overall medical attempt to forcibly alter sexual orientation. The administration of antipsychotic drugs, for instance, may classify the practice as experimentation, because of the "exploratory" nature of the use of such drugs for sexual orientation "therapy." The prevailing judicial opinion regarding the medical value of antipsychotic drugs provides support for this contention. In *Riggins v. Nevada*, a seven-member Supreme Court majority rendered constitutionally impermissible the involuntary administration of antipsychotic drugs to a pretrial detainee.¹⁰⁵ Writing for the Court, Justice O'Connor recognized the uncertainties and the dangerous side effects associated with these particular drugs.¹⁰⁶ In concurrence, Justice Kennedy wrote specifically to express his own apprehensions regarding the state of medical knowledge.¹⁰⁷ Their combined opinions exemplify the ready availability of relevant case law to help guide asylum adjudicators in rendering these medical decisions.¹⁰⁸ Furthermore, the adjudicator's task may be simplified in the context of foreign states that inject lesbian and gay inmates with pharmaceuticals "banned in the US because of their dubious benefits and severe adverse side effects."¹⁰⁹

Third, the alleged distinction between cure and experimentation is untenable with regard to manipulation of sexual orientation. With the background battle of acquiring protected status as a social group already won, the notion of "curing" this same social group by medically removing their affiliative link seems de facto persecutory. Moreover, the concept of "curing" lesbian and gay sexual orientation is generally considered anathema by leading

105. 504 U.S. 127 (1992). Previously, in *Washington v. Harper*, 494 U.S. 210 (1990), the Court had considered the issue of involuntary administration of antipsychotic drugs to prison inmates. The Court recognized a due process right to refuse the medication, which could be overridden only if a seriously mentally ill prison inmate is a danger to self or others, and the treatment is in the inmate's medical interest. *Id.* at 219-27. In *Riggins*, the Court narrowed *Harper's* holding to prison settings, in which constitutional rights receive less protection. *Riggins*, 504 U.S. at 134-35.

106. For example, Justice O'Connor reproduced, at length, the description of unpredictable side effects written by Justice Stevens in *Harper*. See *Riggins*, 504 U.S. at 134 (detailing intended effects of drugs in altering chemical balance of brain and describing potential side effects, including irreversible neurological disorders and cardiac failure). Justice O'Connor's recurrent employment of Justice Stevens's *Harper* opinion is relevant to the next part's discussion of his use of the Helsinki Accord.

107. Justice Kennedy expressed severe doubt that the state could prove beneficial results from administering involuntary doses of antipsychotic medicines, "given our present understanding of the properties of these drugs." *Id.* at 139 (Kennedy, J., concurring). He also registered "substantial reservations," based on his review of the medical literature, regarding the state's ability to avoid significant mental impairment during the defendant's trial. *Id.* at 141.

108. This decision represents the controlling judicial appreciation for the medical utility of this particular technique. In general, asylum adjudicators may turn to the accessible resource of prevailing judicial opinion rather than searching through the medical literature.

109. HELSINKI WATCH, GLASNOST IN JEOPARDY 45 (1991).

medical experts.¹¹⁰ The American Psychological Association's Executive Director for Professional Practice recently explained that same-sex sexuality "is neither mental illness nor moral depravity" and that "study after study [has documented] the mental health of gay men and lesbians," suggesting that efforts to "repair" their orientation are nothing more than "social prejudice garbed in psychological accouterments."¹¹¹

Furthermore, in these asylum cases, the trope of distinguishing "curative purpose" from experimentation should be revealed for what it is—preliminary testing and studying aimed at discovering the means for wide-scale extermination of particular sexual orientations.¹¹² A country's history of subordinating lesbian and gay persons helps unveil the pretextual character of the "medical" rationales for these procedures. Consider the following benevolent "health concerns" raised in defense of a doctor accused of practicing forced sterilizations on certain population groups:

[His] life work . . . as a physician was based on the principle of helping the physically and mentally affected and to find cures for restoring them as fully qualified members of human society. . . . He also made this principle the finding [sic] principle of his work as chief physician of the hospital at Hohenlychen. . . . [H]e was convinced that the faculties of physically and mentally handicapped patients ought to be improved by new methods of treatment and their efficiency thus increased.¹¹³

These words were voiced by a Dr. Gebhardt's legal counsel in defense of his participation in the Nazi sterilization campaign. A central component of the sterilization project featured the administration of a powerful pharmaceutical, cladium seguinum, to those deemed "physically and mentally affected" without their consent.¹¹⁴ Gay men were among the subjects placed in this group. The

110. See Peter McColl, *Homosexuality and Mental Health Services*, BRIT. MED. J., Feb. 26, 1994, at 550, 550. ("Historically, medicine and psychiatry defined homosexuality as a disease or homosexuals as disturbed. But rigorous research has failed to differentiate homosexual and heterosexual populations on the basis of personality or psychopathology.").

111. American Psychological Association Official Bryant L. Welch Questions "Reparative Therapy" for Homosexuality, PR NEWSWIRE, Jan. 26, 1990, available in LEXIS, News Library, Pnews File. For a more thorough treatment of the broader medical ethics debate over whether protections accorded therapy can be separated from those accorded experimentation and research, see Jay Katz, *Human Experimentation and Human Rights*, 38 ST. LOUIS U. L.J. 7 (1993). According to Dr. Katz, "[p]hysician-investigators have long maintained that clinical research and therapy, more often than not, are indistinguishable." *Id.* at 12. Dr. Katz concludes that, notwithstanding a limited procedural distinction between the two, "the doctrine of informed consent, as currently articulated, imposes similar disclosure and consent obligations for therapy and research." *Id.* at 13. Therefore, even if the medical interventions concerning lesbian and gay refugees can be distinguished as therapy rather than experimentation, the doctrine of informed consent still governs.

112. In a worrisome number of countries, the state actively hunts down and institutionalizes lesbian and gay persons, subjecting them to forced psychiatric treatment. If any of these procedures hypothetically proved successful, it is not unimaginable that a broader "cleansing" campaign would be launched.

113. 1 TRIALS OF WAR CRIMINALS, *supra* note 55, at 702-03.

114. 1 *id.* at 696-99, 706-07.

sterilization campaign had independently targeted gay men as a mentally deviant population requiring sexual neutralization.¹¹⁵

Dr. Gebhardt's principle-based defense finds an analogue in present-day attempts to justify forced "medical" intrusions into the hearts and minds of gay and lesbian persons. The lack of informed consent and the background context of past persecution should, as with the Nuremberg cases, effectively combine to defeat this trope of curative purpose. In the case of *In re Pitcherskaia*, for instance, the psychiatric fate of Russian lesbianism emerged out of a larger history of state and societal repression. The insight of Masha Gessen, a refugee from the former Soviet Union, provides a contextual account:

Neither laws nor public opinion change overnight, however. Article 121 [male, same-sex sodomy statute] has not been repealed, and though it is not included in the draft of the new penal code, activists worry that the authorities will continue to enforce sexual-assault laws selectively against homosexuals and that lesbians will continue to be subjected to unwanted psychiatric treatment. A 1990 poll showed that a third of the population of the Soviet Union believed that homosexuals should be exterminated, a third believed we should be isolated from society, and only 10 percent believed we should be left alone.¹¹⁶

Gessen's testimony fits into a vital and legally cognizable argument under asylum law, which recognizes a country's past episodes of group-based persecution as judicially relevant information.¹¹⁷ This type of sociocultural insight robs the curative pretext of its persuasiveness by revealing an underlying motivation of "social cleansing" and extermination.

Again, even if the practice is not experimentation, there is a fourth argument for applying the Code: The IMT's Judgment rendered legal pronouncements on matters beyond mere experimentation. For example, the IMT's proceedings and legal decisions encompassed the Third Reich's involuntary euthanasia program, the skeleton collection project, and the scheme to exterminate and quarantine certain Polish nationals.¹¹⁸ Additionally, the Nuremberg Code's first principle, stating "voluntary consent of the human subject is absolutely essential,"¹¹⁹ contrasts with the other nine principles, which clearly evince concern specifically for experimentation subjects. The

115. "A further decree of 1935 provided for the compulsory sterilisation (often in fact castration) of homosexuals, along with epileptics, schizophrenics, and other 'degenerates.'" David Fembach, Introduction to HEINZ HEGER, *THE MEN WITH THE PINK TRIANGLE* 7, 12 (1980).

116. Masha Gessen, *We Have No Sex: Soviet Gays and AIDS in the Era of Glasnost*, in *COMING OUT: AN ANTHOLOGY OF INTERNATIONAL GAY AND LESBIAN WRITINGS* 57, 69 (Stephan Likosky ed., 1992).

117. The BIA stated: "Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims." *In re Mogharrabi*, 19 I. & N. Dec. 3028 (BIA 1987) (emphasis added).

118. See *supra* note 55 discussing medicalized projects.

119. 2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 181.

generality of the first principle's language thus arguably invites its application beyond the scope of experimentation. For instance, the Tribunal relied on the principle of informed consent in its consideration of the Nazi euthanasia program, a discrete issue clearly separate from the list of experimentation studies.¹²⁰

Finally, the Nuremberg Code's first principle of informed consent has been broadened beyond mere experimentation by subsequent jurisprudence. Justice Stevens's dissenting opinion in *Washington v. Harper* relied on "the principle stated by the Nuremberg Military Tribunals 'that the voluntary consent of the human subject is absolutely essential. . . to satisfy moral, ethical and legal concepts.'"¹²¹ This consideration anchored his position that unwarranted antipsychotic medication is especially "degrading if it overrides a competent person's choice to reject a specific form of medical treatment."¹²² Difficulties arguably arise in giving too much weight to Justice Stevens's analysis because it occurs in a dissent.¹²³ Notwithstanding that quandary, the Code still offers the best available human rights standard for judging the permissibility of these acts. The Nuremberg trials "infused international law with fundamental moral principles in a manner not seen for more than a century and gave birth to the modern international law of human rights."¹²⁴ As such, they reasonably exert

120. The relevance of informed, uncoerced consent with regard to nonexperimental medical practices appears, for instance, in the specific judgment of Karl Brandt. Here, concerned with the euthanasia program, the IMT emphasized the lack of necessary consent:

Persons actively concerned in the program were required to subscribe a written oath of secrecy and were warned that violation of that oath would result in most serious personal consequences.

The consent of the relatives of the "incurables" was not even obtained . . . Needless to say, these persons did not voluntarily consent to become the subjects of this procedure.

2 TRIALS OF WAR CRIMINALS, *supra* note 55, at 197. Similarly, briefs submitted by the prosecution described the medical warehousing of tubercular patients in "a reservation similar to the reservation for lepers." 1 *id.* at 762.

121. *Washington v. Harper*, 494 U.S. 210, 237 n.2 (1990) (Stevens, J., concurring in part and dissenting in part). In this footnote, Justice Stevens redeployed Justice O'Connor's opinion from *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part).

122. *Harper*, 494 U.S. at 237 (1990) (Stevens, J., concurring in part and dissenting in part).

123. However, this aspect of Justice Stevens's dissent is arguably in agreement with the conclusions of the majority. No dispute existed concerning whether inmate Harper possessed a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Harper*, 494 U.S. at 221. In fact, Stevens quoted the majority to demonstrate his agreement on this issue. *Id.* at 237 (Stevens, J., concurring in part and dissenting in part). The two sides, though, differed in their respective evaluations of the Washington state prison's administrative protections of this right. The majority took special care to explain that their disagreement with the dissent concerned this procedural, not substantive, question of due process. *Id.* at 228. Thus, Justice Stevens's application of the Code did not conflict with the Court's holding. Moreover, Justice Stevens's conclusions were vindicated, in large part, by Justice O'Connor's opinion for the Court in *Riggins*, 504 U.S. at 127. Extracts from Justice Stevens's *Harper* dissent form a veritable basis of *Riggins*' seven-member majority opinion. See discussion *supra* notes 105-06. Even if one considers these arguments unconvincing, Justice Stevens's opinion nonetheless adds legitimacy to international human rights standards. Both the *Harper* and *Riggins* holdings recognize a fundamental liberty interest in the right to refuse antipsychotic medication. Justice Stevens's employment of the Code, though in dissent, is in this sense an elaboration of the argument's underlying rationale.

124. Fogelson, *supra* note 71, at 833; see also ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1962).

a pervasive influence on both courts and litigants.¹²⁵ Justice Stevens recognized the instrumental value of applying the Code's framework in a sphere unmistakably beyond its original reach. At the very least, his approach is both encouraging and instructive. The ethical and legal framework outlined by the IMT offers a conceptual tool for analyzing the involuntary "medical" interventions faced by lesbian and gay refugees. Gauged by the Nuremberg Code's standards for human rights, these practices substantively satisfy a legal showing of persecution.

III. THE HELSINKI ACCORD

The Nuremberg Code emerged in response to the atrocities discovered by the world community at the close of World War II. Similarly, subsequent international human rights instruments have arisen in recognition of other forms of widespread persecution. One set of these instruments, the 1975 Helsinki Accord,¹²⁶ directly addresses new concerns regarding the persecutory use of "medical" practices. As such, the Accord offers another framework for articulating the asylum claims of many lesbian and gay refugees.

A. *The Grounding of Human Rights Provisions Against Medical Abuse*

During the Cold War, contending nations heavily scrutinized each other's internal conditions. Domestic human rights issues surfaced as one of the principal sources of East-West debate. In a spirit of relative cooperation, thirty-five countries agreed to codify international standards for human rights by which all members should abide.¹²⁷ This group, organized as the Conference on Security and Cooperation in Europe (CSCE), recorded its human rights principles as an integrated section of the resulting Helsinki Final Act.¹²⁸ The 1975 Helsinki Final Act possessed several unique features. It declined treaty status,¹²⁹ insisted on consensus voting for all issues,¹³⁰ and required a

125. Fogelson, *supra* note 71, at 903. Fogelson endeavors to influence courts and parties to incorporate the Nuremberg Code explicitly in their decisionmaking. His discussion centers on the Code as judicially enforceable, binding international law. *Id.* As such, his trouble with the Code's status as binding law is not a concern for this Note's conclusion. See discussion *supra* note 69.

126. Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Final Act].

127. The nations included the United States, Canada, the Soviet Union, and all European countries except Albania. Thomas Buergenthal, *International Human Rights Law and the Helsinki Final Act: Conclusions*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 3, 3 (Thomas Buergenthal ed., 1977).

128. Final Act, *supra* note 126. The Helsinki Accord tackled a host of other issues, including scientific cooperation, security concerns, and commercial exchanges.

129. President Ford stated before signing the Accord: "I would emphasize that the document I will sign is neither a treaty nor is it legally binding on any particular state." *European Security Conference Discussed by President Ford*, 73 DEP'T ST. BULL. 204, 205 (1975). Nevertheless, the Helsinki Accord

series of Follow-Up Meetings.¹³¹ The third CSCE Follow-Up Meeting, after twenty-seven months of negotiation, culminated in 1989 in the Concluding Document of the Vienna Meeting (VCD),¹³² which codified breakthrough results in the area of human rights.¹³³ This achievement was due primarily to Gorbachev's reversal of previous Soviet intransigence.¹³⁴ Speaking a new "common language of human rights," the CSCE agreed to specify certain principles in unprecedented detail.¹³⁵

A commitment to eliminating state-sanctioned abuse of psychiatric practices emerged from this new climate of openness and cooperation. The U.S. delegation had promised to advance this concern as a priority issue, having learned of the Soviet and East European use of psychiatry as a tool of repression.¹³⁶ The delegation achieved marked success. The final document contained a provision (§ 23f) requiring nations to end abusive "medical" practices as a mandate of fundamental human rights: "The participating States will . . . protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and take effective measures to prevent and punish such practices."¹³⁷

The CSCE's decision to place the provision against abusive "medical" practices on a short list of significant human rights violations indicates its importance; the other five provisions on the list involved well-established, long-venerated human rights concerns.¹³⁸ The elevation of "medical" human

operates as an important determinant of international human rights standards. *See* United States v. Kakwirakeron, 730 F. Supp. 1200, 1202 (N.D.N.Y. 1990) ("The Helsinki Accords, the objectives of which have received continued support from the signatory states, would certainly be indicative of the status of international law on self-determination of peoples and of the duty of nations to abide by their international obligations."); *see also* Jochen A. Frowein, *The Interrelationship between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights*, in *HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD*, *supra* note 127, at 71 (discussing significance of Final Act in forwarding other human rights instruments).

130. Final Recommendations of the Helsinki Consultations § 69 (1973), *reprinted in* JOHN J. MARESCA, *TO HELSINKI: THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE 1973-1975*, at 243 (2d ed. 1987).

131. Final Act, *supra* note 126, §§ 1324-25.

132. Meeting of the Conference on Security and Co-Operation in Europe: Concluding Document from Vienna, 28 I.L.M. 527 (1989) [hereinafter VCD].

133. The first two Follow-Up Meetings, dealing with this dimension of the Final Act, had both failed to produce a concluding document. Their incapacity was mostly due to the stringent requirement of unanimity and the backdrop of Cold War hostilities. *See* Chris van Esterik & Hester Minnema, *The Conference That Came in From the Cold*, in *THE HUMAN DIMENSION OF THE HELSINKI PROCESS* 1, 2 (Arie Bloed & Pieter Van Dijk eds., 1991).

134. STEFAN LEHNE, *THE VIENNA MEETING OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, 1986-1989*, at 150-52 (1991).

135. *Id.* at 151-52.

136. Laurie Watson, *U.S. to Raise Soviet Psychiatric Abuses at Human Rights Conference*, UPI, May 6, 1985, available in LEXIS, News Library, UPI File.

137. VCD, *supra* note 132, at 535 § 23f.

138. *See id.* § 23. "Medical" human rights violations share company with the following: arbitrary arrest, detention, or exile, *id.* § 23a; inherent dignity of individuals in incarceration or detention, *id.* § 23b; observation of the Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials, *id.* § 23c; torture and other cruel, inhuman, or degrading treatment or punishment, *id.* § 23d; consideration of acceding to the Convention against Torture and other Cruel, Inhuman or

rights violations to unanimous, official recognition was, in the view of one analyst of the Vienna Conference, "[m]ost significant, in light of the widespread abuses in this area."¹³⁹

B. *Current Applications: Sexual Orientation Persecution*

The plain language of the VCD's Provision 23f alone should compel asylum adjudicators to consider "medical" interventions that are designed to forcibly alter sexual orientation as a transgression of international human rights standards. Nevertheless, a well-documented history of congressional and executive deliberation lends itself to resolving any interpretative ambiguities if necessary. Both Congress and the executive branch have condemned various uses of forced "medical" intervention. For instance, federal legislation specifically invoked the Helsinki Accord in the wake of Romania's psychiatric institutionalization and forced drugging of Christians.¹⁴⁰ In addition, the U.S. delegation at the Vienna Meeting formally addressed "the commitment of sane persons to [psychiatric] institutions."¹⁴¹ A congressional human rights subcommittee similarly denounced "psychiatric incarceration to punish free expression" as a violation of Helsinki principles.¹⁴² The Soviet Union's "pattern of systematic misdiagnosis and major shortcomings in pharmacology" also met with extreme disapproval when reviewed by the U.S. Commission on Security and Cooperation in Europe, the interbranch body responsible for monitoring Helsinki compliance.¹⁴³ Surely the identical practices perpetrated against lesbian and gay persons violate the Helsinki Accord.¹⁴⁴

Degrading Treatment or Punishment, *id.* ¶ 23e.

139. LEHNE, *supra* note 134, at 161.

140. The Senate adopted Symms Amendment No. 945, which raised the issue of "[r]elatives of Christian believers [who] are often compelled to sign statements that could subject their loved ones, solely because of their religious belief—to treatment and detention in psychiatric hospitals." 131 CONG. REC. 30,241–42 (1985). This allegation, number nine on the list of grievances, contributed to the amendment's final statement that "[t]hese actions are particularly objectionable because they are in blatant violation of the Helsinki Accords." *Id.* at 30,241.

141. Richard Schifter, U.S. and Soviet Quality of Life Compared, Address by the Head of U.S. Delegation to Helsinki Accord, Conference on Security and Cooperation in Europe (May 22, 1985), in VOJTECH MASTNY, HELSINKI, HUMAN RIGHTS, AND EUROPEAN SECURITY 289, 291 (1986).

142. See *Democratic Reforms and Human Rights in Eastern Europe, Hearings of the Human Rights and International Organizations Subcomm. of the House Foreign Affairs Comm.*, Federal News Service, Oct. 11, 1989, available in LEXIS, Legis Library, Fednew File (statement by Steny Hoyer, Chair) [hereinafter *Democratic Reforms*].

143. Steny H. Hoyer, *Psychiatric Abuses Persist in Russia*, WASH. POST, Aug. 22, 1989, at A19. After the Vienna Follow-Up concluded, the Soviet Union permitted an official delegation of U.S. specialists to examine psychiatric facilities and patients. The U.S. experts were permitted access to 24 patients who had been hospitalized for schizophrenia or other psychological disorders. *Id.* "Yet when Soviet psychiatrists examined these 24 patients together with the U.S. delegation, using standard diagnostic criteria, they diagnosed such disorders in only nine cases. . . . Their report also observed that antipsychotic medicines have been used for punitive purposes on patients who exhibit no signs of psychoses." *Id.* Representative Hoyer was co-chair of the U.S. Commission on Security and Cooperation in Europe. *Id.*

144. For asylum purposes, attempting to forge a distinction between lesbian and gay persons and these other groups is not legally viable, given the equally protected status accorded sexual orientation.

One might object to this assessment, however, by claiming a distinction between forced "medical" intervention as political torture and forced medical intervention as therapy. Under this view, lesbian and gay persons are forcibly subjected to "medical" practices due to a curative motivation, not a punitive one. A series of rejoinders should eliminate this objection. First, the objection is premised on the shaky assumption that intentions matter, while asylum case law recognizes that oppression is no less severe if perpetrated by the well-intentioned.¹⁴⁵ Similarly, VCD Provision 23f is not concerned with state intentions behind psychiatric abuse.¹⁴⁶ In fact, a government's unintentional neglect of persistent psychiatric abuse may constitute a violation.¹⁴⁷ Thus, a persecutor's unintentional neglect, curative purpose, or other supposedly innocent motivations that might nevertheless be responsible for a deprivation of human rights do not reduce an asylum applicant's eligibility.

Second, the Helsinki principles also govern circumstances in which individuals are arguably medically ill. For example, Helsinki Watch reported on the Russian "medico-labor prophylactic colonies" in which suspected chronic alcoholics and drug addicts are forced to undergo severe psychiatric treatment: "Initially, inmates are subject to an aversion therapy reminiscent of 'A Clockwork Orange,' that consists of seating them around a large trough, pouring them some of their favorite drink laced with a chemical to induce vomiting, and letting them drink and vomit into the trough."¹⁴⁸ These "medical" tactics closely resemble, in almost textbook form, certain of the sexual orientation procedures we have already discussed.¹⁴⁹ Thus, the Helsinki principles render certain "medical" practices impermissible without having to resolve concerns about the legitimacy of classifying lesbian and gay persons as mentally ill.

Other provisions of the Helsinki Accord further inform this analysis. The Final Act itself suggests that the application of its principles should

145. Motivation does matter in one aspect: An applicant must provide evidence that the persecutor was motivated on account of the applicant's status in one of the five enumerated groups (political opinion, social group, religion, nationality, or race). See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992). But asylum law does not require that the persecutor be motivated by malice. See *Fisher v. INS*, 37 F.3d 1371, 1383 (9th Cir. 1994) (authorities' enforcing moral codes "in spite of knowledge of" dissenting beliefs); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (requiring conformance to laws that are fundamentally abhorrent to one's deeply-held religious beliefs); *In re Sanchez & Escobar*, 19 I. & N. 276 (BIA 1985) (interim decision) ("One of the significant aspects of this construction of 'persecution' was the concept that the harm or suffering had to occur as the result of a belief or characteristic an oppressor sought to *overcome or punish* in an individual." (emphasis added)). Interestingly, psychiatric aversion therapy may uniquely satisfy a combination of seeking both to "overcome and punish" due to its aversive penalty-motivation.

146. See VCD, *supra* note 132, ¶ 23f.

147. The provision's commitment for states to "take effective measures to prevent and punish such practices" reflects the signatories' understanding that the human rights violations of "medical" abuse may exist in absence of affirmative state action. *Id.*

148. HELSINKI WATCH, PRISON CONDITIONS IN THE SOVIET UNION: A REPORT OF FACILITIES IN RUSSIA AND AZERBAIDZHAN 56 (1991).

149. See *supra* text accompanying note 100.

coincide—"each of them being interpreted taking into account the others."¹⁵⁰ Thus, provisions of the Final Act reaffirm Provision 23f's direct prohibition of involuntary "medical" procedures. For example, the Final Act's Point VII requires the protection of freedoms of conscience and thought.¹⁵¹ Certain psychiatric procedures risk eviscerating these freedoms at their core. The Moscow Group to Promote Observance of Helsinki included in its mission the reporting of "special manifestations of inhumanity, for example . . . forcible psychiatric treatment with the purpose of changing thoughts, conscience, religion, or beliefs."¹⁵² Similarly, in his *Harper* dissent, Justice Stevens incorporated Helsinki standards in his reasoning that forcible administration of antipsychotic drugs risks illegitimate government interference.¹⁵³ He quoted from congressional testimony regarding the Soviet Union's use of psychiatric interventions: "It is obligatory that Helsinki signatory states not manipulate the minds of their citizens; that they not step between a man and his conscience or his God; and that they not prevent his thoughts from finding expression through peaceful action."¹⁵⁴ Justice Stevens's legal analysis implies judicial willingness to incorporate international human rights standards and supplies an example to be followed by other courts.

In the case of sexual orientation interventions, the self-proclaimed goals of the attending physicians manifestly conflict with Helsinki's strong protections of conscience and thought. Regardless of punitive or therapeutic motive, the purpose of involuntary sexual orientation procedures is, by definition, the forced alteration of cognition. This attempted mental reordering of lesbian and gay persons intrudes on their consciences and their rights of expression.¹⁵⁵ The element of involuntariness constitutes the harm, and the use of certain procedures amplifies the damage.¹⁵⁶ Indeed, this domineering

150. Final Act, *supra* note 126, ¶ 1296.

151. *See id.* ¶ 1295. "The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion." *Id.*

152. Iurii Orlov et al., *On the Formation of the Public Group to Promote the Observance of the Helsinki Agreements in the USSR*, May 12, 1976, in *REPORTS OF THE HELSINKI ACCORD MONITORS IN THE SOVIET UNION* 3 (1977), reprinted in *MASTNY*, *supra* note 141, at 103.

153. *See* *Washington v. Harper*, 494 U.S. 210, 238 (1990) (Stevens, J., concurring in part and dissenting in part).

154. *Id.* at 238 n.3 (quoting *Hearings on Abuse of Psychiatry in the Soviet Union Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 106 (1983) (remarks by Max Kampelman, Chair of the U.S. Delegation, Plenary Session of Commission on Security and Cooperation in Europe)).

155. For a more extensive development of this argument, see Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1 (1989).

156. For example, the freedoms of thought, conscience, and belief are literally vanquished by the administration of psychotropic drugs. The medications chemically cripple the subject's ability to formulate independent thoughts. Dr. Anatoly Koryagin, who spent six years in a Soviet prison after accusing the government of putting dissidents in mental hospitals, described the purpose and effects of administering these drugs:

I documented of course what they were doing to these people Namely, the fact that they were giving them [a] neuroleptic drug[] . . . [which] essentially affects the central nervous

mental invasion distinguishes psychiatric confinement as a unique form of persecution, perhaps even more severe than circumstances of criminal imprisonment.¹⁵⁷

The Helsinki principles also require the promotion of individuals' ability to engage in social, civil, and political discourse in accord with the "dignity of the human person."¹⁵⁸ The forced psychiatric incarceration of lesbian and gay persons effectively defies this edict, as institutionalization segregates a person from her community. Asylum adjudicators should recognize this dynamic as uniquely persecutory for social group claimants.¹⁵⁹ Additionally, adjudicators should avoid being deceived by the benevolent guise of mental health. A closer review of political and cultural contexts should assist their understanding. For example, in some foreign states, mental health institutions are often run by the ministry of interior, which is the military and law enforcement arm of the state.¹⁶⁰ The prison-like facilities of these hospitals, such as those in Cuba, may bear little resemblance to their American counterparts.¹⁶¹ Furthermore, cultural factors surrounding the discourse of mental health may generate levels of social stigma unimagined by an uninformed American perspective.¹⁶² Indeed, for a lesbian or gay person

system, affects your ability to move and it also can create some very bad side effects if it goes and is given uncorrected. . . . One purpose was to crush their will, remove power. And then also to create a very, very strange and difficult feeling

The MacNeil/Lehrer NewsHour (PBS television broadcast, June 24, 1987).

157. The Supreme Court noted an elevated due process concern in the transfer of a prison inmate to a psychiatric institution due to unique personal deprivations not deserved by criminal conviction. *See Vitek v. Jones*, 445 U.S. 480 (1980). In the Soviet Union, many have had the ability to compare forced imprisonment with psychiatric institutionalization and have found the latter much more abhorrent. *See ALEXANDER PODRABINEK, PUNITIVE MEDICINE 37* (1980); Richard J. Bonnie, *In the West, The Verdict on Soviet Psychiatry Is Still Out*, N.Y. TIMES, Oct. 8, 1989, at E5.

158. "The participating States . . . will promote and encourage the effective exercise of civil, political, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development." Final Act, *supra* note 126, ¶ 1295.

159. Asylum law recognizes, rather generically, that "confinement" alone can generate a condition of persecution. *See Fisher v. INS*, 37 F.3d 1371, 1380 (9th Cir. 1994).

160. After expulsion from the World Psychiatric Association, and in order to seek reentry in the late 1980s, the Soviet Union transferred control of several of its mental hospitals from the Interior Ministry to the Ministry of Health. Nevertheless, doctors continued to hold military rank, and most of the staff members were still Interior Ministry employees. Brooke A. Masters, *Soviets Still Hospitalized for Political Views, Group Says*, WASH. POST, July 13, 1989, at A11; *Soviets Still Abuse Foes, Group Says*, CHI. TRIB., Apr. 18, 1990, at 22 [hereinafter *Soviets Still Abuse Foes*]. In 1990, the Soviet Interior Ministry still maintained control over 1,000 psychiatric hospitals throughout the country. *Id.* at 22. Certain of these conditions persist in post-Soviet Russia. *See, e.g., Judicial Psychiatry, supra* note 98. In Cuba as well, the Interior Ministry helps manage psychiatric hospitals. *See, e.g., Vladimir Orlov, Punitive Psychiatry in Socialist Cuba*, MOSCOW NEWS, Mar. 29, 1992, available in LEXIS, World Library, Mosnws File.

161. *See, e.g., Orlov, supra* note 160.

162. In certain echelons of modern American life, "seeing an analyst" may be routine or even "sexy," but in Russia, for example, psychiatry is clouded by the past of Soviet repression. *See Genine Babakian, Russians Confused by Therapy*, MOSCOW TIMES, July 23, 1994, at 510 ("After all, it wasn't long ago that the only access to psychiatric care was through the police and a straightjacket" "People still associate psychiatry with political repression." (quoting Dr. Nikolai Naritsyn)); Lidove Noviny, *Psychiatry in Chaos*, THE GUARDIAN (London), Feb. 2, 1993, at 16 ("Those who went through psychiatric treatment were marked people 'If someone visits a psychiatrist in Europe or America, it is a matter of social prestige. In Russia it is totally unacceptable.'" (quoting Dr. Modest Kabanov)).

already burdened with the social ostracism that pervades particularly heterosexual cultures, the official label of mental insanity brands them for life.¹⁶³ The double burden of public exposure of their sexual orientation and the cultural meaning attached to forced psychiatric hospitalization essentially relegates them to a long and painful social death.¹⁶⁴ Such state-generated public opprobrium fundamentally interferes with the "inherent dignity of the human person" as protected by the Helsinki Accord.¹⁶⁵

C. *Current Applications: Russian Punitive Medicine*

The Helsinki Accord provides a conceptual tool for unmasking the trope of medical beneficence by challenging it on a more fundamental level. Previously, the Soviet Union's official use of medicalization to disguise its de facto criminalization of political and social dissidence posed an evaluative difficulty for its critics. The Helsinki Accord, however, offered them a framework for articulating the unacceptability of such practices.¹⁶⁶ VCD Provision 23f defined medicine as a potential mechanism for persecutory goals, rather than as a presumptive or unmitigated good. This maneuver robbed the medicalization trope of much of its persuasive value. The remaining inquiry looked to the socio-political context behind the medical practices to determine whether or not a gross violation of human rights was in operation. The Helsinki Accord, as a directive for international standards of human rights, thus offers effective assistance for many lesbian and gay asylum applicants.

In Pitcherskaia's case, for example, the immigration judge framed his opinion in terms of Russian psychiatry both as an enactment of medical

163. Notably, a unanimous Supreme Court based its holding, in part, on recognition of the "indisputable" and "significant impact" of social stigma generated by involuntary psychiatric institutionalization in America. See *Addington v. Texas*, 441 U.S. 418, 425-26 (1979) (holding that civil proceedings to commit individual involuntarily to state mental hospital require "clear and convincing" standard of proof).

164. In many countries, these social effects may be quite severe. Dr. Simon Gluzman describes the veritable social death of involuntary psychiatric inmates in Russia after their release:

There are the living and the dead, the living and the dead eyewitnesses. The most horrible thing is the victims still walking on this earth. They are deprived of their jobs, their families have left them. Many can't take part in life. They've been broken, and there's nobody to help them.

Nightline: The Soviet Psychiatric System (ABC television broadcast, Sept. 25, 1991) [hereinafter *Nightline*].

165. Although U.S. constitutional guarantees are not extended to asylum applicants, Supreme Court cases addressing involuntary institutionalization may still be instructive. The Court has used some of its strongest language with regard to this issue: "We have recognized that for the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty.'" *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)); see also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)).

166. The former chair of the U.S. Helsinki Commission described the pragmatic utility of the Helsinki Accord in terms of its ability to frame standards for abuse of state power: "[I]n Romania, there are persons of great courage and integrity who are continuing, even in the face of severe repression, to raise issues of human rights. And when they do so, they point to the Helsinki process as their justification for doing so. So, it gives them a philosophical and political framework within which to act." *Democratic Reforms*, *supra* note 142.

beneficence and as a medicalized profession distinct from the military establishment.¹⁶⁷ A relevant consideration is how this Note's analytic strategy might have advanced Pitcherskaia's claim. If Pitcherskaia's application had been pursued along a Helsinki human rights approach and informed by the knowledge of historic Russian psychiatric abuse, hopefully the judicial outcome would have been different. At the very least, the judge's discursive ability to reach his somewhat facile conclusions would have been curtailed. The following discussion demonstrates the usefulness of the Helsinki Accord for many lesbian and gay asylum applicants, in general, by focusing on Russian medical practices as a model.¹⁶⁸

During the last decade, the Helsinki Accord was repeatedly invoked to demonstrate that psychiatric incarceration of political dissidents was truly a state effort to neutralize objectionable ways of thinking and was thus no different from criminal imprisonment or internment in reeducation camps. The Helsinki Accord correspondingly demonstrates the illegitimacy of this form of neutralization of sexual identity. In the case of post-Soviet Russia, the continued incarceration of lesbian and gay persons should be seen as a product of the exact same deployment of state power.¹⁶⁹

Russia's ongoing use of psychiatry as a disciplinary and punitive technique is rooted in a horrific past. One of the most revealing examinations of Soviet psychiatry appears in Alexander Podrabinek's book *Punitive Medicine*.¹⁷⁰ The book's title expresses his conclusion that Soviet psychiatry was a breed apart from the traditions of benevolent medicine. Punitive medicine entailed the production of institutional power to quash those actions that the state considered to be either potentially threatening forms of nonconformity or abhorrent forms of unconventionality.¹⁷¹

167. Remarkably, the immigration judge spoke in terms of psychiatrists' possible concern for "treatment" and for the otherwise fragile mental health of lesbian women. See *In re Pitcherskaia*, No. A-72143932, slip op. at 12-13 (Immigration Judge June 13, 1994). His failure to recognize Russian medical professionals and their concerns as a subsection of the Russian military perhaps reveals his limited knowledge of the political and institutional setting. *Id.* at 12, 24.

168. I have selected the Russian experience as a centerpiece for this discussion because it is one of the most well-documented histories of psychiatric abuse and because of its relevance to *In re Pitcherskaia*.

169. In a recent article, a now freed political dissident recounted the use of mental hospitals as a suppressive method of psychiatric neutralization: "They never believed that I was mentally ill. They told me that I was being held to keep me from resuming my activities." Lori Cydilo, *The Insanity of Russian Psychiatry*, WORLD PRESS REV., Aug. 1993, at 44, 44. The reporter covering this story noted that "[u]nder the communists, hundreds, perhaps thousands, of political dissidents were forced to have 'treatment' in psychiatric hospitals as a way to silence them. They were not the only ones. Many whose cases were never publicized suffered the same fate." *Id.* These other cases included the sexual dissidents who still languish in their cells. See MASHA GESSEN, INTERNATIONAL GAY & LESBIAN HUMAN RIGHTS COMM'N, THE RIGHTS OF LESBIANS AND GAY MEN IN THE RUSSIAN FEDERATION 52-55 (1994).

170. See PODRABINEK, *supra* note 157.

171. *Id.* at 5.

Beginning in the mid-1940s, a nationwide system of psychiatric hospitals was assembled to house the politically and socially troublesome.¹⁷² Diagnostic tools were invented such as "sluggish schizophrenia," a mental illness which included in its classification persons who entertained "delusions of reformism" or demonstrated other forms of antisocial or antistate behavior.¹⁷³ The "theoretical basis for punitive medicine" was developed by further "widening the range of the definition of schizophrenia and social danger."¹⁷⁴

Lesbian and gay persons shared in this historic onslaught against troublesome forms of dissidence. Lesbian women found themselves classified under the rubric of "sluggish schizophrenia."¹⁷⁵ And "homosexuality," in general, was regarded as a unique threat to both the social fabric and politics of socialism.¹⁷⁶ Like other social and political dissidents, sexual dissidents were incarcerated for purposes of psychiatric "rehabilitation" on account of their so-called crimes, depravities, and sins. Medical technology thus functioned as the mechanism of repression and "social cleansing."¹⁷⁷ Supervising officials employed dangerous pharmaceuticals, in particular, to neutralize dissident behavior by chemically melting it away. For example, in the former Soviet Union, lesbianism as a symptom of "schizophrenia" could be met "with such tranquilizers as Majeptil, a drug that has driven some to suicide. One injection of Sulfazine can literally immobilize a prisoner for three days. Many are kept on it for months."¹⁷⁸ Though without mention of lesbian inmates, a 1992 U.S. State Department dispatch reported the continued use of these drugs under the new Russian government.¹⁷⁹

172. *Id.* at 40-41; Tom Dworetzky, *Asylum! Psychiatry in the Soviet Union*, OMNI, Feb. 1992, at 46, 48.

173. Dworetzky, *supra* note 172, at 84.

174. PODRABINEK, *supra* note 157, at 41. During his 30-year reign as head of the system, KGB Colonel Lunts devised much of this theoretical framework and also single-handedly "declared more than 1,000 sane political prisoners mentally ill." Dworetzky, *supra* note 172, at 48.

175. GESSEN, *supra* note 169, at 17-18.

176. Gessen, *supra* note 116, at 61-62. Gessen also refers to an influential Russian columnist's use of the cultural aphorism: "Eliminate homosexuality, and you will make fascism disappear." *Id.* at 61.

177. Former Soviet and present-day Russian officials, unwittingly or openly, acknowledge much of this indictment. Here are three poignant examples of either blind admission or unapologetic candor. The former Soviet regime exiled Alexander Podrabinek to Siberia for nearly six months for writing his book, as a bizarre testament to the accuracy of his account. See John Langone, *A Profession Under Stress*, TIME, Apr. 10, 1989, at 94, 95. Second, after the U.S. official investigation and admonishment of post-Vienna psychiatric conditions, Soviet officials proclaimed that the delegation gave too much credence to statements of the mentally ill patients. According to their officials, "it is not the accepted custom to discuss with patients the methods for treating them, except for cases where a physician is the patient." Robert Pear, *Report Reproaches Soviet Psychiatry*, N.Y. TIMES, July 13, 1989, at A3. Third, a Russian hospital director recently complained that "our psychiatry has been overly humanized" in his response to progressive reform ideas. Cydilo, *supra* note 169, at 44.

178. Robert Marquand, CHRISTIAN SCI. MONITOR, Aug. 14, 1984, at 21.

179. See 1991 U.S. DEP'T STATE HUM. RTS. REP. 1270 (1992).

Although many of the other social and political dissidents of the Soviet era have since been released, lesbian and gay persons are still kept behind bars¹⁸⁰ and within the clamps of punitive medicine.¹⁸¹ Their caretakers are the same torturers of the past.¹⁸² They are subject to the threat of powerful drugs used "as a means of intimidation, punishment and deliberate suppression of nonconformist individuals."¹⁸³ In 1995, for the first time, the U.S. State Department's *Human Rights Report* called attention to the plight of Russian lesbian women being forcibly held as psychiatric inmates and treated with mind-altering drugs:

[P]olice frequently place lesbians against their will into psychiatric hospitals after receiving requests from family members or friends to commit the "patient" to an institution for treatment. The Moscow Society for Lesbians, Literature, and Art alleges that medical textbooks in Russia still include materials on clinical treatments for homosexuality as a mental illness. In psychiatric hospitals, chemical treatments are prescribed, and lesbians are sometimes beaten if they refuse treatment, according to the Society which claims the only way to be discharged is to renounce their sexual orientation.¹⁸⁴

These conditions are maintained in violation of Russia's commitments to Helsinki.

It must not be assumed that these practices are mere aberrational hold-overs from the Soviet Union. Throughout the twentieth century and in several countries, a continuum of medicalized state control of lesbian and gay lives has surfaced—from Nazi policies to U.S. immigration law. The Russian experience also has exact analogues in contemporary China and Singapore, where even today authorities conduct the most grotesque forms of medicalized repression. Moreover, the use of medicine is just one form of persecution selected from a bazaar of technological mechanisms and official pretexts. In other countries, the lack of such technology may pose the only significant obstacle to implementing such an approach. In the meantime, those with the animus for persecution have access to lethal injection, torture chambers, extrajudicial

180. 1994 U.S. DEP'T STATE HUM. RTS. REP. (1995), available in LEXIS, News Library, Dstate File. See generally GESSEN, *supra* note 169 (describing continued incarceration of lesbian and gay persons despite release and reparations given to other Russian dissidents).

181. Ten years after writing *Punitive Medicine*, Podrabinek considered purported psychiatric reforms to be strictly cosmetic: "The only thing that has changed is the label." Langone, *supra* note 177, at 84.

182. Even if they had sufficient resources, hospitals like Serbsky may never live down their old reputations as torture chambers for one good reason. Many of the doctors most responsible for the abuses are still running the system. Which means, critics say, that new laws and good intentions will not be enough to stop the horror stories for good.

Nightline, *supra* note 164.

183. N. Safronova, *Soviet Psychiatry Still "Mangling" Lives*, CURRENT DIGEST OF THE SOVIET PRESS, May 2, 1990, at 5.

184. 1994 U.S. DEP'T STATE HUM. RTS. REP., *supra* note 180, at 936.

killings, and criminal law in order to decimate the fundamental human rights of sexual orientation dissidents.

IV. CONCLUSION

[I]t is time to realize that the incarceration of the liberal-minded in insane asylums is *psychic murder*; this is but a variant of the *gas chamber* and yet even more cruel, for the torments of the debilitated are more insidious and more lasting. Just as with the gas chambers, these crimes will *not* be forgotten. And all of those involved with these crimes, no matter when they perpetrated them, will be tried, both in life and in death.

In both unbridled lawlessness and licentious acts one must be ever mindful of the limits beyond which a man becomes a cannibal. This is but a cursory assessment that one can live with only if one constantly employs force and constantly ignores the objections of conscience.¹⁸⁵

This Note has considered asylum determinations under U.S. asylum law's first prong: the required showing of persecution. Several authoritative sources invite the incorporation of international human rights standards into these decisions. This invitation may be viewed as rather commonsensical: If an applicant establishes a well-founded fear of an international human rights violation, surely this satisfies the relevant legal requirement. It certainly would appear illegitimate for an asylum adjudicator to hold that an applicant's internationally recognized human rights are threatened and yet conclude that such a harm does not constitute persecution.

International human rights standards offer practitioners and adjudicators a conceptual framework for both articulating and evaluating claims of persecution. These standards reflect lengthy deliberations by nation-states, usually in enlightened proximity to gross human injustice. Those persons subject to the worst forms of human indecency know the meaning of these standards with bitter accuracy. For many lesbian and gay persons located across the earth, this very day is ridden with well-founded fear—the surge of electric voltage through every bit of muscle, skin, and bone; the reprehensible taste of toxic regurgitant forced down the throat; the burning-alive sensation of an antipsychotic drug overdose; or the final terror-stricken thought before the first lobotomical cut. With this awareness, they share a profound knowledge of the human ability to transgress the fundamental rights of innocents. If any of these people can make it to our shores, our laws must offer them safe haven.

185. ALEXANDER SOLZHENITSYN, *THIS IS HOW WE LIVE*, quoted in Alexander Ginzburg, *Foreword* to PODRABINEK, *supra* note 157, at xi.